



**FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554**

May 9, 2002

Xpedite Systems, Inc.¹
100 Tormee Drive
Asbury Park, New Jersey 07712-7502
Attention: Robert Mainor, President
Vincent Devita, Executive Vice President/COO
Ian Bedford, Vice President, Finance/CFO
Patrick Jones, Vice President/Secretary

Xpedite Systems, Inc.¹
PTEK Holdings, Inc.²
3399 Peachtree Road NE, #600
Atlanta, Georgia 30326-1120
Attention: Boland Jones, CEO
Roy Cammarano
Theodore Schrafft
Max Slifer
Jeffrey Allred
Richard Buyens
Will Franklin
Patrick Jones
William Thurber
Randy Salisbury

RE: EB-02-TC-071

Dear Correspondents:

This is an official **CITATION**, issued pursuant to section 503(b)(5) of the Communications Act of 1934, as amended (Communications Act), for possible violations of the Telephone Consumer Protection Act of 1991³ (TCPA) and the Federal Communications Commission's rules that implement that Act.⁴

¹ The Telecommunications Consumers Division has obtained information that Xpedite Systems, Inc. has approximately 46 multiple branches and divisions throughout the United States and at various international locations.

² The Telecommunications Consumers Division has obtained information that Xpedite Systems, Inc. is a subsidiary of PTEK Holdings, Inc.

³ Pub.L. No. 102-243, 105 Stat. 2394-2402 (1991) (codified at 47 U.S.C. § 227).

⁴ 47 C.F.R. § 64.1200.

It has come to our attention that your company recently transmitted to telephone facsimile machines unsolicited advertisements for products, goods, or services offered by Wall Street Watch a.k.a. Pics L Wallstreet L (see attachments).⁵ Pursuant to the TCPA and the Commission's Rules, it is unlawful to use a "telephone facsimile machine, computer, or other device to send an unsolicited advertisement to a telephone facsimile machine."⁶

The TCPA and the Commission's rules also require any person or entity who sends a message via a telephone facsimile machine to clearly mark "in a margin at the top or bottom of each transmitted page of the message or on the first page of the transmission, the date and time it is sent and an identification of the business, other entity, or individual sending the message and the telephone number of the sending machine or of such business, other entity, or individual."⁷

The term "unsolicited advertisement" is defined in the TCPA and the Commission's rules as "any material advertising the commercial availability or quality of any property, goods, or services which is transmitted to any person without that person's prior express invitation or permission."⁸ The Commission has specified that an established business relationship between a fax sender and recipient constitutes prior express invitation or permission to send a facsimile advertisement.⁹ Mere distribution or publication of a fax number, however, does not establish consent to receive advertisements by fax.¹⁰

Although entities that merely transmit facsimile messages on behalf of others are not liable for compliance with the prohibition on faxing unsolicited advertisements,¹¹ the exemption from liability does not exist when a fax transmitter has "'a high degree of involvement or actual notice of an illegal use and [has] fail[ed] to take steps to prevent such transmissions.'"¹² Accordingly, fax transmitters do not enjoy an absolute exemption from liability under the TCPA and the Commission's Rules.

⁵ In addition to the advertisement(s) referenced by and attached to this citation, the complaining party may also have included with the complaint one or more facsimile advertisements transmitted by other senders. This citation concerns only the facsimile advertisement(s) referenced by and attached to the citation, and your response only needs to address such advertisement(s).

⁶ 47 U.S.C. § 227(b)(1)(C); 47 C.F.R. § 64.1200(a)(3).

⁷ 47 U.S.C. § 227(d)(1)(B); 47 C.F.R. § 68-318(d).

⁸ 47 U.S.C. § 227(a)(4); 47 C.F.R. § 64.1200(f)(5).

⁹ *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Report and Order, 7 FCC Rcd 8752, 8779 n. 87 (1992) (*TCPA Report and Order*); *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Memorandum Opinion and Order, 10 FCC Rcd 12391, 12408 (1995) (*TCPA Memorandum Opinion and Order*).

¹⁰ *TCPA Memorandum Opinion and Order*, 10 FCC Rcd 12391, 12408.

¹¹ *Id.* at 12407.

¹² *TCPA Report and Order*, 7 FCC Rcd 8752, 8780 (1992) (quoting *Use of Common Carriers*, 2 FCC Rcd 2819, 2820 (1987).)

This citation serves as notice that the unsolicited facsimile advertisements sent by Wall Street Watch a.k.a. Pics L Wallstreet L and transmitted by your company violate the TCPA and the Commission's Rules. The Commission may assess to your company monetary forfeitures not to exceed \$11,000 for each subsequent violation if (1) your company has been highly involved on behalf of the sender of any unsolicited facsimile advertisements, or (2) your company continues to transmit facsimile advertisements for Wall Street Watch a.k.a Pics L Wallstreet L without taking steps to ensure that the sender has obtained permission from recipients to fax the advertisements.

Pursuant to section 503(b)(5) of the Communications Act, you may request a personal interview at the Commission's Field Office nearest to your place of business. The nearest office appears to be either the New York Office at 201 Varick Street, Room 1151, New York, New York 10014 or the Atlanta Office at Koger Center-Gwinnett -- Room 320, 3575 Koger Boulevard, Duluth, Georgia 30096. You can contact the New York Office or the Atlanta Office by telephone at, (888) 225-5322 or (770) 935-3370, respectively. You must schedule this interview to take place within 21 days of the date of this citation. Alternatively, you may submit a written statement to the following address within 21 days of the date of this citation:

Kurt A. Schroeder
Deputy Chief, Telecommunications Consumers Division
Enforcement Bureau
Federal Communications Commission
445 - 12th Street, S.W.
Washington, D.C. 20554

Please reference EB-02-TC-071 when corresponding with the Commission.

If you choose to submit a written statement, you should discuss in detail your company's involvement in faxing advertisements on behalf of Wall Street Watch a.k.a. Pics L Wallstreet L, including any specific arrangements under which you transmit their advertisements. Please provide copies of any contracts or agreements that memorialize the terms and conditions under which you fax for Wall Street Watch. You should also answer the following questions:

1. Has your company had any control over or involvement in determining the content of advertisements transmitted by facsimile on behalf of Wall Street Watch a.k.a. Pics L Wallstreet L or any other entities on whose behalf you transmit advertisements by facsimile? Please describe such control or involvement in detail.
2. Who provided, compiled, or generated the distribution list(s) of telephone facsimile numbers that your company has used to transmit advertisements on behalf of Wall Street Watch a.k.a. Pics L Wallstreet L or any other entities on whose behalf you transmit advertisements by facsimile?
3. If your company has been involved in any way in providing, compiling, generating, or editing the distribution list(s) of telephone facsimile numbers that your company has used to transmit advertisements on behalf of Wall Street Watch a.k.a. Pics L Wallstreet L or any other entities on whose behalf you transmit advertisements by

facsimile, describe in detail the process by which your company produces or participates in the generation of such list(s). Does your company employ or compensate any individuals or entities outside the company, including any tax-exempt nonprofit organizations, for any service, activity, assistance, or facilities used in connection with your company's providing, compiling, generating, or editing of such list(s)? Please describe such arrangements in detail.

4. If your company has been involved in any way in providing, compiling, generating, or editing the distribution list(s) of telephone facsimile numbers that your company has used to transmit advertisements on behalf of Wall Street Watch a.k.a. Pics L Wallstreet L or any other entities on whose behalf you transmit advertisements by facsimile, what steps has your company taken to ensure that the telephone facsimile numbers belong to individuals or entities who have agreed, by explicit consent or by virtue of an established business relationship with the advertiser, to receive the advertisement? Please describe in detail the manner in which you record consumers' consent or the existence of an established business relationship and provide copies of any written record-keeping policies with respect to maintaining evidence of such consent or business relationship.
5. Does your company advertise its fax transmittal services, and, if so, by what means? Please provide copies of all print, audio, and video materials that have been used within the past year to advertise your company's fax transmittal services. For each advertisement, list the media in which the advertisement appeared and the date(s) of such appearance(s).

Under the Privacy Act of 1974, 5 U.S.C. § 552(a)(e)(3), we are informing you that the Commission's staff will use all relevant material information before it to determine what, if any, enforcement action is required to ensure your compliance with the TCPA and the Commission's rules. This will include any information that you disclose in your interview or written statement. Please be advised that if you choose not to respond to this citation and a forfeiture is issued, your unresponsiveness will be considered in our assessment of a forfeiture amount.

You should also be aware that the knowing and willful making of any false statement, or the concealment of any material fact, in reply to this citation is punishable by fine or imprisonment under 18 U.S.C. § 1001.

Thank you in advance for your anticipated cooperation.

Sincerely,

Kurt A. Schroeder
Deputy Chief
Telecommunications Consumers Division
Enforcement Bureau
Federal Communications Commission

Enclosures